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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 72-790

STATE OF ALABAMA AND
W. S. FURLOW, WARDEN,
PETITIONERS

VS.

WILLIAM G. BRINKS,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONSE NOT PRINTED

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NO. _____

STATE OF ALABAMA AND
W. S. FURLOW, WARDEN,
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VS.

WILLIAM G. BRINKS,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners, the State of Alabama and W. S. Furlow, as Warden, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on March 1, 1972, and modified on September 26, 1972.

PRIOR OPINIONS

The opinion of the Court of Appeals of Alabama affirming the respondent's conviction is reported as: *Brinks v. State*, 44 Ala. App. 266, 207 So. 2d 127 (1967). For the convenience of this Honorable Court a copy of this opinion is attached hereto as Appendix "A".

The order of the Supreme Court of Alabama denying without opinion a writ of certiorari to the Court of Appeals of Alabama is reported as: *Brinks v. State*, 281 Ala. 716, 207 So. 2d 129 (1968).

The opinion and judgment of the United States District Court for the Southern District of Alabama denying the writ of habeas corpus has not been reported, but a copy of the same is attached hereto as Appendix "B".

The original opinion and judgment of the United States Court of Appeals for the Fifth Circuit issued on March 1, 1972, reversing the judgment of the United States District Court for the Southern District of Alabama is reported as:

Brinks v. Alabama, et al (5th Cir., 1972) ___ F. 2d ___ this opinion not having yet been reported is attached hereto as Appendix "C".

The opinion of the United States Court of Appeals for the Fifth Circuit as modified and issued on September 26, 1972, is reported as follows:

Brinks v. Alabama, et al (5th Cir., 1972 ___F. 2d ___, this opinion not having been reported is attached as Appendix "D".

JURISDICTION

The judgment of the Court of Appeals was rendered on March 1, 1972. A timely application for rehearing en banc was denied on September 26, 1972, and this petition for a writ of certoriari is filed within ninety (90) days of that date.

This Honorable Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Does a United States Court of Appeals have jurisdiction under 28 U.S.C. 2254(a) to revise an uniform interpretation of a State statute?

2. Does a United States Court of Appeals err when it orders, pursuant to 28 U.S.C. 2254(a), a new trial for a State prisoner on the grounds that the prisoner's rights under State statutes have been violated, where the State Appellate Courts, under their uniform interpretation of such statutes, had previously found no violations of the prisoner's rights under them?

STATUTORY PROVISIONS INVOLVED

UNITED STATES CODE, TITLE 28:

§2254. *STATE CUSTODY; REMEDIES IN FEDERAL COURTS*

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the grounds that he is in custody in violation of the Constitution or laws or treaties of the United States.

CODE OF ALABAMA, TITLE 15:

§426. *INQUISITION IN CERTAIN CASES OF FELONY: PROCEEDINGS*

If any person charged with any felony be held in confinement under indictment, and the trial court shall have reasonable ground to doubt his sanity, the trial of such person for such offense shall be suspended until the jury shall inquire into the fact of such sanity, such jury to be impaneled from the regular jurors in attendance for the week or from a special venire, as the court may direct. If the jury shall find the accused sane at the time of their verdict, they shall make no other inquiry, and the trial in chief shall proceed. If they find that he is insane at that time, the court shall make an order committing him to the Alabama state hospitals, where he must remain until he is restored to his right mind. When the superintendent of the hospitals shall be of opinion that such person is so restored he shall forthwith, in writing, inform the judge and sheriff of such court of the fact, whereupon such person must be remanded into prison on an order of such judge, and the criminal proceedings resumed. In no event shall such person be set at large so long as such prosecution is pending, or so long as he continues to be insane.

STATEMENT OF THE CASE

The petitioners are aware that the justices of this Honorable Court are extremely burdened, and, therefore, the petitioners would like to present to this Honorable Court a very short statement of the case. This unfortunately is impossible. This Honorable Court is the sixth court to examine these matters. The issues presented have roots going back nearly a decade. During that time the case has,

except for one period of about a year, been constantly in one court or another. And, to adequately present these issues to this Honorable Court each phase of this litigation must at least be touched.

Briefly, a State trial court convicted the respondent; A State appellate court affirmed the conviction; the State Supreme Court declined to review the case; a United States District Court denied a writ of habeas corpus to the respondent, but the United States Court of Appeals for the Fifth Circuit reversed and ordered a new trial on the ground that the respondent's rights under a State statute had been violated. It is this last ruling that the State of Alabama and W. S. Furlow, Warden, pray this Honorable Court to review.

On February 16, 1966, the respondent robbed a grocery store in Mobile, Alabama. He was subsequently indicted for this offense by the Grand Jury of Mobile County, Alabama. The respondent was found to be indigent and was appointed counsel to represent him. (Petitioner's Exhibit # 1, pages 9-10 and 25-36.)[1]

Prior to his trial a motion to investigate his sanity[2] was filed by the respondent. Supporting this motion were several letters from teachers who had taught the respondent some ten to thirteen years earlier citing delinquent behavior by the respondent and concluding that he had been an emotionally disturbed child. There was also a letter from

[1] Petitioner's Exhibit #1 is the separately bound Record on Appeal in the Court of Appeals of Alabama; it is part of the Record of these proceedings.

[2] What the respondent sought by this motion was a psychiatric examination, for this reason the terms "investigation of his sanity", "psychiatric examination" and "psychiatrist" have been used throughout the litigation interchangeably depending on the context.

the respondent's mother also citing delinquent behavior by the respondent as well as his being upset from time to time. After examining the evidence, the State trial court denied the motion for an investigation of the respondent's sanity. (Petitioner's Exhibit #1, pages 3, 6 and 15-18.)

On October 26, 1966, the respondent was tried by a jury, found guilty, and sentenced to ten years imprisonment. (Petitioner's Exhibit #1.)

An appeal was taken to the Court of Appeals of Alabama raising the following points:

1. That the respondent's right to counsel was violated at a pre-indictment line-up

and

2. That the respondent should have been granted a sanity investigation either

(a) pursuant to the United States Constitution and/or

(b) pursuant to various Alabama statutes.

The Court of Appeals of Alabama ruled against the respondent on both points. The line-up issue was resolved under *Stovall v. Denno*, (388 U.S. 293, 18 L. Ed. 2d 1199, 87 S. Ct. 1967 [1967]). The sanity investigation issue was resolved under Alabama law. (*Brinks v. State*, 44 Ala. App. 266, 207 So. 2d 127 [1967] Appendix "A".) In another of the respondent's cases, identical in all relevant respects to the instant case, the Court of Appeals ruled that a sanity investigation was not required by due process. See *Brinks*

v. State (44 Ala. App. 601, 604, 217 So. 2d 813 [1968] Cert. den. 283 Ala. 712, 217 So. 2d 820).

The respondent then sought a writ of certiorari from the Supreme Court of Alabama raising the same points raised in the Court of Appeals. The writ was denied on February 15, 1968. (*Brinks v. State*, 281 Ala. 716, 207 So. 2d 129 [1968].)

On May 5, 1969, the respondent instituted the action which would ultimately bring these matters to this Honorable Court. On that date he filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Alabama. This petition as it was amended subsequent to the appointment of counsel to assist the respondent, claimed that his rights under the Constitution of the United States had been violated by the State Trial Court's failure to provide him with a sanity investigation. Naturally, the claims to such an investigation under Alabama's statutes were not asserted in this action filed under 28 U.S.C. 2254[1]. R. pp. 1-16.)

The State responded to the petition and, for reasons which are not now relevant, conceded that if the respondent had raised a "substantial question" of his sanity in the State Trial Court, he should have been granted a sanity investigation. A hearing was held in the District Court. At this hearing the respondent presented the same evidence that he had previously presented to the State Trial Court. He also presented evidence which had not been available at the time of the State court proceedings. This consisted of the testi-

[1] 28 U.S.C. 2254 provides that an application by a person in State custody for a writ of habeas corpus shall be entertained "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

mony of two fellow inmates that the respondent acted irrationally and of the prison doctor. The doctor admitted that he was not a psychiatrist but testified that the respondent was emotionally unstable and a non-conformist. The doctor also testified that he was under the impression that the respondent suffered from dyslexia, which, according to the doctor, is a form of insanity. The State introduced the testimony of an Air Force Psychologist that dyslexia was a condition related to eye coordination and resulted in the individual's inverting and transposing letters and numbers. The psychologist testified that dyslexia was not an emotional or mental disorder and was not related to intelligence. The State also introduced an Army psychiatric evaluation showing that the respondent was "mentally responsible, able both to distinguish right from wrong and to adhere to the right." (R. pp. 110-175.)

After hearing the evidence the District Court denied the writ. With regard to the evidence which had been presented to the State Trial Court the District Judge wrote this:

> "The petitioner [the respondent] contends that a man approximately 25 years old can present to the [State] trial court letters from teachers, who taught him in grade school when he was 12 to 15 years old, saying he appeared to be an emotionally disturbed child when they taught him and from his mother saying in very general terms that he was upset and frequently in trouble and thereby present a substantial question as to his sanity. The Court disagrees with that contention. If a defendant has to reach back a decade to obtain lay opinions of his emotional condition and shows nothing else, he has not met his burden of proving that a "substantial question" of his sanity exists and the Court finds that the state

court did not abuse its discretion in denying petitioner's motion for a sanity investigation." (R. pp. 99-102, Appendix B, pp. 26-27.)

The District Court ruled that the new evidence presented by the respondent for the first time in the District Court should be presented to the State Courts prior to its submission to the Federal Courts. See Appendix B.

The respondent appealed the District Court's denial of the writ to the United States Court of Appeals for the Fifth Circuit. (R. pp. 102-106.)

On March 1, 1972, the Honorable Court of Appeals for the Fifth Circuit reversed the District Court's denial of the writ and ordered a new trial. (*Brinks v. Alabama* —— F. 2d. ——, Appendix C.)

Although the Court of Appeals' opinion was subsequently revised, a brief review of it would undoubtedly be helpful to this Honorable Court. The Court found that the evidence presented in the State Trial Court by the respondent in support of his motion for a sanity investigation "was of an ambiguous nature". Then the Court wrote:

> " . . . Were this the only evidence that Brinks [the respondent] attempted to bring before the state court we would have no hesitation in holding that the [State] trial judge was within his discretion in refusing the sanity investigation. Indeed to hold otherwise would be tantamount to removing the discretionary function which the Alabama legislature has placed upon the state's trial judges." (Appendix C, page 32.)

The Court then pointed out that if the respondent had been affluent he could have obtained psychiatric evidence to present in the State Court proceeding on whether or not he should have his sanity investigated. The Court concluded that the failure to provide the respondent with this assistance deprived him of due process, equal protection of the laws, a fair trial and the effective assistance of counsel. The Court of Appeals then ordered a new trial for the respondent directing:

> "If the State of Alabama elects to retry Brinks [the respondent] and he files a new motion for a sanity investigation, the state must provide petitioner [the respondent] with the means of obtaining expert testimony as bearing upon the question of whether or not he is entitled to a sanity investigation." (Appendix C, page 34.)

The Court, therefore rejected the respondent's long standing claim that he had the right to a sanity investigation because of the evidence he had shown the State Trial Court. Instead the Court found that the respondent had the right under the Constitution of the United States to a psychiatrist to assist him in the State Court proceeding on whether or not he had the right to a psychiatrist.

The State of Alabama immediately applied for a rehearing pointing out several apparent flaws in the opinion and decision of the Honorable Court of Appeals.

On September 26, 1972, the Honorable Court of Appeals for the Fifth Circuit denied rehearing but modified its original opinion. The modified opinion apparently again rejected the respondent's claim that he had the right to a psychiatric investigation under the Constitution of the

United States. Instead the Court found a right to an independent jury determination of the respondent's sanity under an Alabama statute. (*Brinks v. Alabama* [5th Cir., 1972] ____ F 2d ____, Appendix D.)

On motion of the petitioners, the State of Alabama and W. S. Furlow, Warden, the Honorable Fifth Circuit Court of Appeals withdrew its mandate and stayed it until December 20, 1972, pending this application to this Honorable Court.

REASONS FOR GRANTING THE WRIT

I

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE AUTHORITY OF THE FEDERAL COURTS UNDER 28 U.S.C. 2254 TO SUPERVISE STATE COURTS AND TO REVIEW THEIR PROCEEDINGS.

The modified opinion of the Honorable Court below rests squarely on an Alabama statute, Title 15, Section 426, of the 1940 Code of Alabama (recomp. 1958), Appendix E, page 40. Other Alabama statutes are discussed but discarded as inapplicable. When this opinion is compared with the respondent's State Court litigation (See *Brinks v. State*, 44 Ala. App. 266, 207 So. 2d 127, [1967], Appendix A), it becomes apparent that the Honorable Court of Appeals is doing nothing more nor less than exercising supervision over the courts of the State of Alabama, reviewing their proceedings and revising their construction of an Alabama statute.

28 U.S.C. 2254 provides for a writ of habeas corpus to be issued by Federal courts to prevent a State prisoner from remaining in custody in violation of the "Constitution or laws or treaties of the United States". The words of this statute

are clear and hardly admit an interpretation which would permit a Federal Court to supervise State Courts. And, this has been the almost uniform interpretation of this statute by the Courts of Appeal.

In *Jackson v. California* (9th Cir., 1964) 336 F. 2d 521 the Ninth Circuit, quoting the earlier case of *Sampsell v. California* (9th Cir., 1951) 191 F. 2d 721, Cert. den. 342 U.S. 929, 96 L. Ed. 692, 72 S. Ct. 369 wrote:

> "'Federal Courts must withhold interference with the administration of state criminal justice unless a Federal right has been violated.'" 336 F. 2d 521, 524.

In *Ralph v. Pepersack* (4th Cir., 1964) 335 F. 2d 128, Cert. den. 380 U.S. 925, 13 L. Ed. 2d 811, 85 S. Ct. 907, the Fourth Circuit wrote:

> "*This court has no general supervisory power over state courts* and our inquiry must be confined to determining whether . . . the admission of Ralph's oral confession . . . constituted a denial of due process of law." 335 F. 2d 128, 131-132. (Emphasis supplied.)

The circuits have consistently held that the writ of habeas corpus under 28 U.S.C. 2254 is available to review issues relating to State prisoners' Federal rights only. This, of course, normally means issues relating to rights under the United States Constitution. See *McMichaels v. Hancock* (1st Cir. 1970) 428 F. 2d 1222; *DiMarco v. Greene* (6th Cir. 1967) 385 F. 2d 556; *Salizar v. Rodriquez* (10th Cir. 1967) 371 F. 2d 726; *Poulson v. Turner* (10th Cir. 1966) 359 F. 2d 588; and *Snider v. Cunningham* (4th Cir. 1961) 292 F. 2d 683. Federal habeas corpus is not available to review irregularities in State proceedings which do not present Federal ques-

tions. *Jackson v. California* (9th Cir. 1964) 336 F. 2d 521 (supra). Indeed the Federal Courts are bound by State Court determinations of issues relating to State law. *McMichaels v. Hancock* (1st Cir. 1970) 428 F. 2d 1222 (supra). *Stout v. Capp* (9th Cir. 1970) 426 F. 2d 881 (footnote 2).

Yet, the modified opinion of the Honorable Court below shows that the United States Court of Appeals for the Fifth Circuit not only did not feel itself bound by the Alabama Courts' interpretation of Alabama law but actually rejected such interpretation for its own independent interpretation

The decision of the Honorable Court below rested on its interpretation of an Alabama statute, as already pointed out (in the statement of the case) the Alabama courts had previously reached a different conclusion. It will be pointed out in the next section that the reason for the divergent results is that Alabama's uniform interpretation of the statute directly conflicts with that of the Honorable Court below.

Yet, the circuits have consistently held that the Federal Courts are bound by the constructions placed on State statutes by State Courts. See *Williams v. Brewer* (8th Cir. 1971) 442 F. 2d 657; *Pratt v. Maine* (1st Cir. 1969) 408 F. 2d 311; *Salazar v. Rodriquez* (10th Cir. 1967) 371 F. 2d 726 (supra); *Conway v. Wilson* (9th Cir. 1966) 368 F. 2d 485, Cert. den. 386 U.S. 925, 17 L. Ed. 2d 798, 87 S. Ct. 897; *Silva v. Cox* (10th Cir. 1965) 351 F. 2d 61, Cert. den. 383 U.S. 919, 15 L. Ed. 2d 673, 86 S. Ct. 915.

It follows, therefore, that the decision and opinion of the Honorable Court below conflicts with the decisions of not

less than six other circuits including the First, Fourth, Sixth, Eighth, Ninth, and Tenth Circuits.

II

THE COURT BELOW HAS DECIDED AN IMPORTANT STATE QUESTION IN A WAY WHICH CONFLICTS WITH THE APPLICABLE STATE LAW.

There can be no question but that both the Constitution of the United States and the ancient common law prohibit putting a party who is presently insane to trial on a criminal charge. *Pate v. Robinson* 385 U.S. 375, 15 L. Ed. 2d 815, 86 S. Ct. 836 (1966). There can also be no question but that it is the judiciary which must decide if an accused is presently insane. In the ordinary case this burden falls on the trial judge.

The Honorable Court below found a right to a jury determination of his sanity in the respondent under Title 15, Section 426, of the 1940 Code of Alabama (recomp. 1958). See Appendix "E", page 40.

Yet, the courts of the State of Alabama have consistently held that this statute creates no right in the accused. It creates only authority in the trial court. See *Granberry v. State*, 184 Ala. 5, 63 So. 975 (1913); *Rohn v. State*, 186 Ala. 5, 65 So. 42 (1914); *Whitfield v. State*, 236 Ala. 312, 182 So. 42 (1938); *Burns v. State*, 246 Ala. 135, 19 So. 2d 450 (1944), U.S. Cert. den. 324 U.S. 843, 89 L. Ed. 1405, 65 S. Ct. 589; *Ex Parte Bush* 247 Ala. 351, 24 So. 2d 358 (1945); *Seibold v. State*, 287 Ala. 549, 253 So. 2d 302 (1970); *Kelly v. State*, 45 Ala. App. 144, 227 So. 2d 141 (1969); *Duncan v. State* 46 Ala. App. 732, 248 So. 2d 771 (1971); *Lambert v. State* ___ Ala. App ___, 262 So. 2d 622 (1972); and *Hawes v.*

State) ____ Ala. App. ____, 266 So. 2d 652 (1972). These same cases, beginning with *Rohn v. State* 186 Ala. 5, 65 So. 42 (1914) (supra), in 1914, hold that the trial judge's actions pursuant to this statute are not reviewable on appeal. Admittedly, a few cases mention this section 426 and say that an abuse of discretion by the trial judge may be reviewed. However, when this language appears it is always in reference to a group of statutes which include Section 426 as well as other provisions which are not directly related to it; these pronouncements also invariably appear to be dicta. See *Pearson v. State*, 41 Ala. App. 366, 133 So. 2d 60 (1961); *Wheeler v. State* 47 Ala. App. 457, 256 So. 2d 197 (1971); and *Minniefield v. State* 47 Ala. App. 699, 260 So. 2d 607 (1972). Whenever the Alabama courts have addressed Section 426 alone they have invariably held it to create nothing except a discretionary power in the trial judge, the exercise of which cannot be reviewed. See *Seibold v. State*, 287 Ala. 549, 253 So. 2d 302 (1970) (supra) for the latest decision of the Alabama Supreme Court relating to Section 426.

As stated above, it is the duty of the trial judge to determine if an accused is mentally incompetent to be put to trial. The court may do this on a motion made in behalf of the accused or on its own motion, but it must make the determination itself. What then is the purpose of Section 426? This section, according to the Alabama Courts, provides the trial judge with authority to call a jury to *help him in his determination*.[1] The jury's determination under Section 426 is apparently advisory only. See, for example, *Duncan v. State*, 46 Ala. App. 732, 248 So. 2d 771 (1971) (supra). Thus, if a jury were summoned under Section 426

[1] It might not be utterly irrelevant to observe at this point that Alabama's Trial Judges are popularly elected.

and found an obviously insane defendant to be sane, the trial judge would still be under an obligation to abate the prosecution. When Section 426 is put in its proper perspective it becomes obvious that complete discretion should be placed in the trial judge to call for a jury to help him do his duty. And, thus Alabama's courts have held.

On behalf of the Honorable Court below it must be mentioned that Section 426 was not thoroughly discussed in that Honorable Court. After all, the respondent was claiming a right under the United States' Constitution to a psychiatric examination, not a jury determination of his sanity. The respondent had attempted to use Alabama statutes as a mechanism to assert the right he claimed. It was only in this regard that Alabama statutes entered the case prior to the issuance of the modified opinion below.

It is obvious that the Honorable Court below decided an important State question (i.e., the interpretation and application of a State statute) in a way which conflicts with the applicable State law. If it needs to be made more obvious one need only compare the respondent's case as it was decided by the Court of Appeals of Alabama in 1967 (*Brinks v. State*, 44 Ala. App. 266, 207 So. 2d 127 [1967] Appendix "A") and as it was decided by the Honorable Court below in 1972 (*Brinks v. Alabama* [5th Cir. 1972] ____ F. 2d ____ Appendix "D").

The Court of Appeals of Alabama wrote:

> "We have carefully read the statements touching upon appellant's sanity written by some of his former teachers. We admire the candor and dedication of these fine instructions but the contents of their statements outlining appellant's delinquency do not establish his

insanity. *We do not feel that the trial court abused its discretion in overruling such motion.* Tit. 15, Chapter 21, Article 2, Code of Alabama 1940." (44 Ala. App. 266, 267.) (Emphasis supplied.)

"Title 15, Chapter 21, Article 2, Code of Alabama 1940", cited by the Court, contains Section 426. See Appendix "E". As previously mentioned, when these statutes are grouped together the Alabama Courts often refer to their creating something less than complete discretion in the trial judge.

On the other hand the Honorable Court below wrote:

> "Having reexamined the evidentiary matter presented to the trial judge at the hearing on Brinks' motion, we have no doubt that it met the standard of 'reasonable ground to doubt [Brinks'] sanity' and that the court exceeded the allowable range of its discretion in denying the valuable right provided by § 426 . Our conclusion is reinforced by the fact that the Alabama Court of Appeals reviewed the question under a test of whether the matter presented to the trial judge was sufficient to 'establish [Brinks'] insanity.' 207 So. 2d at 128. This is the very issue that one whose insanity is in doubt is entitled to have decided by a jury." (____ F. 2d ____, ____ Appendix "D", page 38.)

So, the two courts examining the same evidence, the same facts, the same law, indeed sitting on the same case, have reached exactly opposite conclusions. A greater conflict on this important State question cannot be imagined.

III

THE COURT BELOW HAS DECIDED A FEDERAL QUESTION IN A WAY WHICH CONFLICTS WITH THE

APPLICABLE DECISIONS OF THIS HONORABLE COURT

Throughout its history this Honorable Court has held itself and the inferior Federal Courts bound by State law in determining questions relating solely to such law. This Honorable Court has held the Federal Courts to be bound by State court constructions of State statutes. While these statements hardly require exhaustive citation of authority, the following cases contain some of the more recent pronouncements of these ancient principles: *Eisenstadt v. Baird*, ____ U.S. ____, 31 L. Ed. 2d 349, 92 S. Ct. ____ (1972); *Groppi v. Wisconsin* 400 U.S. 505, 27 L. Ed. 2d 571, 91 S. Ct. 490 (1971); and *Oyler v. Boles*, 368, U.S. 448, 7 L. Ed. 2d 446, 82 S. Ct. 501 (1962).

The decision of the Honorable Court below not only rests solely on an Alabama statute but on an utterly different interpretation of that statute from that placed on it by the Alabama Courts.

This is in clear conflict with every decision ever rendered by this Honorable Court on the force, effect, and construction of State laws and statutes in the Federal Courts.

IV

THE DECISION BELOW IS CLEARLY ERRONEOUS AND OUGHT TO BE REVIEWED AND SET ASIDE AS A MATTER OF POLICY

From what has been said it seems to be clear that the decision of the Honorable Court below is erroneous. At this point the people of the State of Alabama would make a simple plea to this Honorable Court for justice.

That the respondent is factually guilty of the crime for which he stands convicted has never been seriously questioned. The respondent was provided by the people of the State of Alabama with free counsel, a full hearing on his motion for a sanity investigation, a constitutionally perfect trial and a free appeal with a full record and counsel to the State's highest court. The respondent's sole objection to the validity of these proceedings is that he was not provided with a free psychiatrist, a contention which the United States District Court rejected and the Honorable Court below apparently rejected. To hold that in spite of all this the people of Alabama through their government violated the rights of the respondent under the United States Constitution is unreasonable and most discouraging.

In a sense a more important consideration is the effect which the action of the Honorable Court below will have on the respondent himself. While there is no real evidence that the respondent is insane or has ever been insane, it is also clear that he is not a person of extensive formal education. The decision of the Honorable Court below will be undoubtedly construed by him to mean that he should not in justice have ever been sent to prison, which indeed the decision does mean in law. Yet, he has served some five years in prison, a great injustice from his point of view. It takes little imagination to see the effect that this will have on past and future efforts to rehabilitate the respondent. "How", the respondent will ask, "Can the State of Alabama demand that I respect the rights of others, when the State, according to the United States Court of Appeals for the Fifth Circuit, has treated me unjustly?"

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

WILLIAM G. BRINKS

v.

STATE

I DIV. 200

COURT OF APPEALS OF ALABAMA

DEC. 5, 1967.

REHEARING DENIED DEC. 19, 1967

(44 ALA. APR. 266, 207 SO 2d 127)

JOHNSON, JUDGE.

Appellant was indicted by the Grand Jury of Mobile County, Alabama, on June 29, 1966, for the offense of robbery. He was arraigned in open court on July 19, 1966, and there, represented by court-appointed counsel, entered a plea of not guilty.

On September 21, 1966, appellant filed a motion for investigation as to his sanity, a motion for leave to file a plea of insanity, and a plea of insanity. On September 23, 1966, the motion for investigation as to the sanity of appellant was heard and the trial court denied the motion.

On October 26, 1966, appellant was tried by a jury, found guilty as charged, and sentenced to ten years imprison-

ment in the State penitentiary as punishment. This appeal is made from said verdict and judgment.

Appellant contends that the trial court erred in denying his motion for a sanity hearing and that it also erred in admitting testimony concerning the identification of appellant in a pre-trial lineup at which time appellant was not represented by counsel.

The evidence reveals that on January 31, 1966, Mr. Roy Dudley, Manager of a Greer's Store in Mobile, Alabama, was robbed of between four hundred and four hundred and fifty dollars, said money belonging to Greer's Store and being in the custody of Mr. Dudley at the time. Mr. Dudley testified that he could identify appellant as the party who robbed him and stated that he identified him from a police lineup. He stated that appellant entered his store, aimed a gun at him and made him lie on the floor prior to the robbery.

Mr. Weston Stewart testified that he was present in the store at the time of the robbery but could not positively identify appellant as the robber either at a pre-trial lineup or at the trial as the robber had a hat "pulled down over his eyes".

Mobile Police Detective Fairlee Morgan testified that he prepared a composite drawing of the suspect from descriptions given him and this drawing led to identification of appellant in several photographs given to Mr. Dudley by Detective Morgan, although Dudley could not be "certain" about the identification.

Mobile Police Detective William Simmons testified in detail regarding the pre-trial lineup at which appellant was identified by the complainant as his assailant.

We have carefully read the statements touching upon appellant's sanity written by some of his former teachers. We admire the candor and dedication of these fine instructors but the contents of their statements outlining appellant's delinquency do not establish his insanity. We do not feel that the trial court abused its discretion in overruling such motion. Tit. 15, Chapter 21, Article 2, Code of Alabama, 1940.

Appellant relies on United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149, and Gilbert v. State of California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178, regarding the right to counsel at pre-trial lineups.

In Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199, the court states the following:

> "It is * * * very clear that retroactive application of Wade and Gilbert 'would seriously disrupt the administration of our criminal laws.' "

Stovall, supra, also states in Headnote 1:

> "The rule required exclusion of identification evidence which is tainted by exhibiting the accused to identifying witnesses before trial in the absence of his counsel affects only those cases and all future cases which involve confrontations for identification purposes conducted in the absence of counsel after June 12, 1967."

Since this trial was conducted on October 26, 1966, *Wade*, and *Gilbert*, supra, the cases relied on by appellant, would not here be applicable.

For the foregoing reasons the judgment in this cause is due to be and the same is hereby

Affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA

WILLIAM G. BRINKS	)	
	)	
Petitioner,	)	
	)	
Vs.	)	CIVIL ACTION NO. 5471-69 T
	)	
STATE OF ALABAMA,	)	
ET AL.	)	
Respondents.	)	

This matter comes on to be heard on the petition of William G. Brinks for writ of habeas corpus filed on May 5, 1969. A hearing was held on September 29, 1970, and additional evidence heard on January 29, 1971, after which date, the case was taken under submission.

The petitioner raised these two issues at the trial: first, the in-court identification of petitioner was tainted by a highly suggestive pre-indictment line-up; second, the trial court denied petitioner effective assistance of counsel by failing to have him examined by a psychiatrist at government expense.[1]

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[1] The petitioner apparently has not appealed his June 5, 1967 robbery conviction since no evidence has been presented to the Court of the

The only evidence offered in support of the first issue is the transcript of petitioner's trial.[2] The victim, Mr. Bear, said there were three to five men in the line-up but that he really did not remember how many were in the line-up. The policeman who arranged the line-up said that there were six men in the line-up — some petitioner's height and weight and some taller. Based on that evidence, the Court does not find that the line-up was "highly suggestive."

When the petitioner requested the state court to provide a psychiatric examination at state expense in September, 1966, he offered letters from his sixth grade teacher, his seventh grade teacher, his grade school principal, and his mother all to the effect that he showed symptoms of being emotionally disturbed. The teachers had taught him eight to 12 years prior to expressing their opinions to the trial court.[3] His mother's letter said he was in trouble frequently; he was upset over his step-father's suicide; and he would sit and cry at times. The state court refused to grant a sanity investigation. The petitioner offers those same letters to this Court. He further offered testimony of two fellow inmates that he acts irrationally, agitated all the

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results of that appeal. An appeal was taken in his October 26, 1966 robbery conviction. (44 Ala. App. 266, 207 So. 2d 127 (1968), cert. denied 208 Ala. 716, 207 So. 2d (1968).) The sanity and line-up issues were identical and the court considers that appeal as a sufficient exhaustion of state remedies.

[2] In the brief filed by petitioner's counsel, reference was made to the testimony of Mobile police detective Simmons. This testimony was apparently given in petitioner's October 26, 1966 trial for robbery of a Mobile grocery store. The only line-up evidence presented at the hearing on September 29, 1970, was the transcript of petitioner's trial for robbery of Bear Ice Cream Co. on June 5, 1967, with the relevant testimony of Mr. Joseph C. Bear and Detective Delhomme.

[3] Defendant's exhibit No. 1 shows that petitioner entered the Army in September, 1958.

tima, odd and peculiar. Dr. James B. Thomas, the doctor for Atmore Prison, testified that petitioner was emotionally unstable in that he had a dependent personality, was a nonconformist, exhibited five-year old tendencies, that he apparently suffered from dyslexia and had a hyper-spastic personality. Dr. Thomas said dyslexia is the inability to read and understand and is a form of insanity. Dr. Thomas' ability as a physician is unquestioned but he is not a psychiatrist. He candidly admitted lacking expertise concerning dyslexia and also stated that he had only an impression that petitioner suffers from dyslexia. The respondent offered the testimony of an Air Force psychologist that dyslexia was not an emotional disorder. The state also introduced a July, 1960 Army psychiatric evaluation. Its diagnosis was "Emotional instability reaction, manifested by immaturity, poor judgment, family problems, and acting out behavior." The report further found that petitioner was not insane and was "mentally responsible, able both to distinguish right from wrong and to adhere to the right."

Both the petitioner[4] and respondent[5] concede that the state must provide the defendant with psychiatric evaluation when a "substantial question" as to defendant's sanity is presented. The petitioner contends that a man approximately 25 years old can present to the trial court letters from teachers, who taught him in grade school when he was 12 to 15 years old, saying he appeared to be an emotionally disturbed child when they taught him and from his mother saying in very general terms that he was upset and frequently in trouble and thereby present a substantial question as to

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[4] p. 13 of Memorandum of Law in Support of Petitioner's Motion for Summary Judgment.

[5] p. 4 of Brief and Argument in Opposition to Petitioner's Motion for Summary Judgment.

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his sanity. The Court disagrees with that contention. If a defendant has to reach back a decade to obtain lay opinions of his emotional condition and shows nothing else, he has not met his burden of proving that a "substantial question" of his sanity exists and the Court finds that the state court did not abuse its discretion in denying petitioner's motion for a sanity investigation.

The Court is not unmindful of the cogent testimony of Dr. Thomas on dyslexia, but the state court should be given the benefit of considering this "new evidence" via a writ of error Coram Nobis.

THEREFORE, it is ORDERED, ADJUDGED and DECREED that the petition for writ of habeas corpus of William G. Brinks should be and hereby is DENIED.

DONE at Mobile, Alabama, this the 30th day of March, 1971.

Daniel H. Thomas
United States District Judge

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2352

WILLIAM G. BRINKS,
Petitioner-Appellant,

versus

STATE OF ALABAMA and
W. S. FURLOW, Warden,
Respondents-Appellees.

Appeal from the United States District Court for the Southern District of Alabama

(March 1, 1972)

Before THORNBERRY, MORGAN and CLARK, Circuit Judges.

MORGAN, Circuit Judge: William G. Brinks, an indigent state prisoner, brought this habeas petition in federal court claiming the State of Alabama violated his constitutional rights by refusing to grant him a sanity investigation prior to his trial. The district court denied the petition. We reverse and remand.

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Petitioner was convicted of robbery in the Circuit Court of Mobile County, Alabama, on October 26, 1966. He was sentenced to ten years in the state's penal system where he is presently confined. Prior to his trial petitioner entered a plea of not guilty and not guilty by reason of insanity. Brinks' appointed attorney then filed a motion for a pre-trial investigation of his client's sanity and requested that the court "call a responsible physician and other qualified witnesses" to determine whether Brinks was insane.[1]

In order to rule on this motion the court held a hearing at which both sides were afforded an opportunity to present evidence concerning Brinks' mental condition. The state offered no evidence, but Brinks introduced one letter from his mother and three letters from former school teachers. Mrs. Mary Lou Purser, Brinks' mother, wrote that her son suffered an emotional shock and became progresaively more upset due to the death of his stepfather. On several occasions Mrs. Purser had returned home to find Brinks sitting and crying, and she believed that he needed professional help. Brinks' sixth grade teacher, Mrs. Dora Lambert, stated that Brinks was abnormal in many ways; that he had a sex problem in the sixth grade; and that "he had all the symptoms of an emotionally disturbed child." In a letter detailing Brinks' various misdeeds, his former school principal described him as having a low I.Q. and a "compulsion for all types of misbehavior." The teacher who taught Brinks in the seventh grade related how the "tendencies which he [Brinks] displayed were not those of an average boy at that age."

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[1] Although not specifically stated in this motion, we assume Brinks was claiming insanity both at the time of the crime and at the time of his trial since most of the evidence of insanity related to Brinks' behavior several years before the offense was committed.

In addition to these letters the court had before it a statement by Brinks' attorney that, based on the attorney's own investigation, Brinks appeared to be insane.

After considering all the evidence the Alabama trial court refused to order a sanity investigation. Brinks was then tried before a jury and convicted of robbery. In affirming the conviction the Court of Appeals of Alabama rejected the contention that the trial court erred in failing to grant Brinks a sanity investigation, *Brinks* v. *State*, Court of Appeals of Alabama, 1967 207 So. 2d 127, and this decision was affirmed by the Supreme Court of Alabama, *Brinks* v. *State*, 1968, 207 So. 2d 129.

To reach the issues raised by this appeal we must first examine the procedural framework used by the State of Alabama to adjudicate pleas of insanity. In any criminal prosecution the defendant has the burden of proving the defense of insanity "to the reasonable satisfaction of the jury." Title 15, § 422, Code of Alabama, 1940 (Recompiled 1958). After pleading insanity in a capital case the defendant may file a motion for a sanity investigation pursuant to Title 15, § 426, Code of Alabama, 1940 (Recompiled 1958). When necessary the trial judge holds a hearing on this motion and takes evidence for the purpose of determining whether there is "reasonable ground"* to believe the accused is insane presently, or that he was insane at the time the offense was committed. If the trial judge finds that there is reasonable ground to doubt the defendant's sanity, an investigation is ordered and the defendant is taken to a state hospital where he is examined by several responsible physicians to determine whether he is legally responsible. However, if the evidence is unsufficient to warrant a sanity investigation the court

*Title 15, § 426, Code of Alabama, 1940 (Recompiled 1958).

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denies the motion and the defendant proceeds to trial. See *Pace* v. *State*, Supreme Court of Alabama, 1969, 226 So. 2d 654, and *Eaton* v. *State*, Supreme Court of Alabama, 1969, 197 So. 2d 761.

In the Alabama appellate courts the standard of review from such a denial is whether the trial judge abused his discretion in refusing to order the investigation. *Pace* v. *State*, supra. The theory behind this procedure is to allow the trial judge to hear all the evidence and then serve as a screening agent to separate the insubstantial claims of insanity from those valid claims which genuinely require a specialized state investigation. *Pace* v. *State*, supra.

If he is unsuccessful in appealing the denial of the sanity investigation to the Alabama courts, the defendant may, of course, bring a habeas petition in federal court on the ground that the trial judge's failure to order the investigation constituted an abuse of discretion in violation of the Due Process Clause of the Fourteenth Amendment. Brinks makes this very argument on this appeal, and the brief of the Attorney General of Alabama is directed entirely toward showing that, on the facts before the state court, the trial judge was well within his discretion in denying the sanity investigation. The Attorney General would distinguish the several cases[1] which most strongly support Brinks' position on the ground that these cases involved far more evidence of insanity than Brinks was able to present. For example, in *Welch* v. *Beto*, 5 Cir. 1966, 355 F. 2d 1016, this court held that the State of Texas deprived the defendant of due process of law by failing to order a sanity investigation, but we relied heavily upon expert

[1] Thomas v. Cunningham, 4 Cir. 1963, 313 F. 2d 934; United States v. Fade, 7 Cir. 1956, 345 F. 2d 691; Welch v. Beto, 5 Cir. 1966, 355 F. 2d 1016.

testimony from a qualified psychiatrist who informed the state court that the accused was insane.

Turning to the evidence which Brinks presented at the state hearing, we note that the testimony was of an ambiguous nature and none of it came from witnesses qualified in the field of psychology or psychiatry. Were this the only evidence that Brinks attempted to bring before the state court we would have no hesitation in holding that the trial judge was within his discretion in refusing the sanity investigation. Indeed, to hold otherwise would be tantamount to removing the discretionary function which the Alabama legislature has placed upon the state's trial judges.

However, apart from his claim that the state arbitrarily denied him a sanity investigation, Brinks advances a second argument which necessitates reversing his conviction. Under the due process and equal protection provisions of the Fourteenth Amendment and the Sixth Amendment's guarantee of effective legal counsel,* Brinks contends that, because of his indigency, he was unable to secure expert testimony to present to the state court before it considered whether there was enough evidence to order a sanity investigation. Had he been affluent, or had the state provided him with funds, Brinks claims he could have introduced evidence which would have compelled a sanity investigation.

As we have previously observed the evidence regarding Brinks' mental condition was ambiguous. The behavior at-

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*As the decisions cited below illustrate, these three constitutional arguments are often interlocked in the type of claim Brinks is asserting:
Griffin v. Illinois, 1956, 351 U.S. 12; Douglas v. California, 1963, 372 U.S. 353; Gideon v. Wainwright, 1963, 372 U.S. 335; McCollum v. Bush, 5 Cir. 1965, 344 F. 2d 672, affirming Bush v. McCollum (N.D. Texas 1964), 231 F. Supp. 560; Bradford v. United States, 5 Cir. 1969, 413 F. 2d 467; Jacobs v. United States, 4 Cir. 1965, 350 F. 2d 571.

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tributed to him could very well exemplify the average deviant whom society holds legally responsible for unlawful acts. But on the other hand, we cannot rule out the substantial possibility that the descriptions of Brinks depict a man who, given the chance to obtain expert testimony, could have produced enough evidence to warrant a sanity investigation. Statements such as "He [Brinks] . . . seemed to have a compulsion for all types of misbehavior," compel us to require that Brinks be given at least the opportunity of bringing an expert before the court.

If Brinks were not indigent, or if the state had an available method of obtaining an expert which Brinks did not take advantage of, we could simply assume that expert testimony would have been unfavorable to the petitioner's case and deny relief. But here we have lay testimony revealing some questionable behavioral patterns coupled with a claim by the accused that, given the means to do so, he could have produced an expert who would have shed some light on his mental condition. Under these circumstances, we fail to see how Brinks could have received adequate representation from his appointed attorney. Moreover, the main thrust of the argument of petitioner's counsel in this court is that he could not adequately represent petitioner because of the lack of an available expert witness.

We hold, therefore, that the state's failure to provide Brinks with either an expert witness or the funds to obtain one deprived him of both a fair trial and the effective assistance of counsel. *McCollum* v. *Bush*, 5 Cir. 1965, 344 F. 2d 672, affirming *Bush* v. *McCollum* (N.D. Texas 1964), 231 F. Supp. 560. The State of Alabama must either retry Brinks or release him since the lapse of time between his trial and this appeal would make a hearing on incompetency an im-

practical remedy at this late date. *Pate* v. *Robinson*, 1966, 383 U.S. 375.[*] If the State of Alabama elects to retry Brinks and he files a new motion for a sanity investigation, the state must provide petitioner with the means of obtaining expert testimony as bearing upon the question of whether or not he is entitled to a sanity investigation.

The district court's denial of the petition is reversed and the case is remanded with directions that the state be afforded a reasonable opportunity to retry petitioner. If the state fails to grant petitioner a new trial, the writ must issue.

REVERSED AND REMANDED.

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[*] In Pate v. Robinson, supra, the Supreme Court held that a lapse of six years between trial and appeal prevented a retrospective determination of an accused's competence to stand trial. With the issuance of this decision it will have been approximately five and one-half years since Brinks was tried. The granting of a new trial, therefore, is the only remedy we can consider in this case.

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APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2352

WILLIAM G. BRINKS,
Petitioner-Appellant,

versus

STATE OF ALABAMA and W. S. FURLOW, Warden,
Respondents-Appellees.

Appeal from the United States District Court for the Southern District of Alabama

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ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC
(Opinion March 1, 1972, 5 Cir. 1972 ____ F.2d ____).

(September 26, 1972)

Before THORNBERRY, MORGAN and CLARK,
Circuit Judges.

PER CURIAM: The original opinion is modified in the following respects:

We have reconsidered under a correct legal standard the evidence presented to the trial judge at the hearing on Brinks' motion for a statutory mental competency examination. Our original opinion referred to the standard before the trial court as "whether there is 'reasonable ground' to believe the defendant is *insane* presently, or that he was insane at the time the offense was committed," which is that of Tit. 15, § 425, Code of Alabama (1958 Recomp.). This is more stringent than the standard correctly applicable, i.e., whether there was "reasonable ground to *doubt* [the accused's] sanity." This is the statutory standard of Tit. 15, § 426, Code of Ala. (1958 Recomp.).

Alabama has three different statutory procedures for mental examinations to which reference should be made. Tit. 15, § 428, is unrelated to competency to stand trial and to criminal responsibility at the time of the offense. It is for the beneficient purpose that a person incarcerated (for any number of reasons, not limited to criminal charges) who is mentally ill may be transferred to a hospital for treatment. *Ex parte Garrett*, 262 Ala. 25, 76 So.2d 681 (1954); *Lee v. Alabama*, 386 F.2d 97 106 (5th Cir. 1967) (en banc). Tit. 15, § 425, prescribes a purely advisory procedure available to the trial judge after indictment in a capital case, if the judge thinks it will be helpful, triggered by the presentation to him of the written report of three expert practitioners or of the superintendent of the state hospitals, showing reasonable grounds to believe that the accused was insane at the time of the offense or presently. No hearing is provided for. The inquiry made under § 425 need not even include competency to stand trial. *Lee v. Alabama, supra*, 386 F.2d at 106.

Sec. 428, the treatment section, is not even arguably relevant in this case. As to § 425, while Brinks was charged

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with robbery, a capital offense in Alabama, Tit. 15, § 415, Code of Alabama (1958 Recomp.), the procedure of this advisory section was not triggered nor was it required to be.

Thus as we concluded in our previous opinion, Brinks' motion fell under Tit. 15, § 426, which provides that "if any person charged with any felony be held in confinement under indictment, and the trial court shall have reasonable ground to doubt his sanity, the trial of such person for such offense shall be suspended until the jury shall inquire into the fact of sanity." If the jury finds the accused sane the trial in chief shall proceed. If found insane the accused must be committed to the state hospital where he must remain until restored. If restored he must be remanded to prison, and the criminal proceedings resumed. In no event may he be released so long as the prosecution remains pending or he continues to be insane.[3] § 426, *supra*.

Throughout the case, there has been considerable confusion as to which procedure Brinks was seeking to invoke. The language of his motion closely tracked § 428.[4] Brinks' brief to the habeas court shed no light on the matter. In its brief the state assumed he was proceeding under § 425 or § 426. The order denying the writ referred to no statute but discussed in general terms the right to be examined by a psychiatrist at government expense. Brinks' brief to this court on appeal refers to only § 425, and § 428, and the state's brief only to § 426. We have been indiscriminately referred to cases under the three sections without regard to their fundamental differences in purpose, procedure and result.[5]

[3] The provisions of § 426 for a separate jury trial on the issue of insanity is a valuable right. **Lee v. Alabama**, supra, 386 F. 2d at 107.

[4] For example, it refers to a jury "if [the judge] deems it necessary," which is quoted from § 428. A jury is mandatory under § 426 and not provided for at all under § 425.

[5] The confusion between these sections is understandable, and shared. See **Lee v. Alabama**, supra, 386 F. 2d at 101-07. See also the

Before the trial judge suspends the normal course of criminal proceedings and conducts a jury inquiry into the "fact of sanity" there must come to his attention factual data, or allegations of factual data, tending to show "reasonable ground to *doubt* [the accused's] sanity." The court has discretion to determine if the underlying factual basis said to exist does in fact exist, and whether such factual basis constitutes "reasonable ground to *doubt* [the accused's] sanity." If that standard is attained, discretion drops out of the picture — that is, the judge has no discretion to disobey the mandate of the statute if the prerequisites for the mandate are present. In its brief to us the State of Alabama acknowledges that the trial courts of that state have begun to recede from their reluctance to grant sanity investigations and that the Alabama Supreme Court has tempered its former position that refusals were by and large unreviewable.

Having reexamined the evidentiary matter presented to the trial judge at the hearing on Brinks' motion, we have no doubt that it met the standard of "reasonable ground to *doubt* [Brinks'] sanity" and that the court exceeded the allowable range of its discretion in denying the valuable right provided by § 426. Our conclusion is reinforced by the fact that the Alabama Court of Appeals reviewed the question under a test of whether the matter presented to the trial judge was sufficient to "establish [Brinks'] insanity." 207 So. 2d at 128. This is the very issue that one whose insanity is in doubt is entitled to have decided by a jury.

Turning to the remedy, the State must either retry Brinks or release him. If it elects to retry him, it must ac-

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opinion of the Alabama Court of Appeals, in Brinks' appeal on the merits, Brinks v. State, 207 So. 2d 127, 128 (Ala. Ct. App. 1967) cert. denied, 207 So. 2d 129 (Ala. Sup. Ct.), citing Tit. 15, Chapter 21, Article 2, of the Alabama Code, which contains both § 426 and § 428 but not § 425.

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cord him the § 426 jury inquiry into the "fact of sanity." A hearing at this time to determine *nunc pro tunc*, if possible, Brinks' mental condition in 1966[4] is not feasible since the proceedings which Brinks sought required determination by a jury.

That part of our prior opinion concerning availability to an indigent of expert psychiatric assistance to show his entitlement to an investigation into his sanity, is withdrawn.

The District Court's denial of the petition is reversed and the case is remanded with directions that the state be afforded a reasonable opportunity to retry petitioner, subject to his right to a § 426 jury inquiry, and should the state elect not to do so the writ must issue.

REVERSED AND REMANDED.

The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is also DENIED.

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[4]Lee v. Alabama, supra; Pate v. Robinson, 383 U.S. 375 (1966).

APPENDIX E

CODE OF ALABAMA
1940
(RECOMP. 1958)

CHAPTER 21

ARTICLE 2.

INQUISITION AND PROCEEDINGS IN REGARD TO INSANE PRISONERS

Sec.

426. Inquisition in certain cases of felony; proceedings.

427. Suspending execution of sentence after conviction on account of insanity of convict.

428. Inquisition upon alleged insane prisoner; further proceedings.

Sec.

429. Court orders to hospital defendant acquitted on account of insanity.

430. Powers of county courts and justices in misdemeanors.

431. Expenses to be paid by the state; when and how state reimbursed.

§ 426. Inquisition in certain cases of felony; proceedings.—If any person charged with any felony be held in confinement under indictment, and the trial court shall have reasonable ground to doubt his sanity, the trial of such person for such offense shall be suspended until the jury shall inquire into the fact of such sanity, such jury to be impaneled from the regular jurors in attendance for the week or from a special venire, as the court may direct. If the jury shall find the accused sane at the time of their verdict, they shall make no other inquiry, and the trial in chief shall proceed. If they find that he is insane at that time, the court shall make an order committing him to the Alabama state hospitals, where he must remain until he is restored to his right mind. When

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the superintendent of the hospitals shall be of opinion that such person is so restored he shall forthwith, in writing, inform the judge and sheriff of such court of the fact, whereupon such person must be remanded to prison on an order of such judge, and the criminal proceedings resumed. In no event shall such person be set at large so long as such prosecution is pending, or so long as he continues to be insane.

§ 427. **Suspending execution of sentence after conviction on account of insanity of convict.**—If after conviction and sentence to death, at any time before the execution of the sentence, it be made to appear to the satisfaction of the trial court that the convict is then insane, such trial court shall forthwith enter an order in the trial court suspending the execution of the sentence to the time fixed in the order; and if it subsequently be made to appear to the court that such convict, the execution of the sentence of whom has thus been suspended, is restored to sanity, the trial court shall forthwith have another order entered ordering and commanding the execution of the judgment and sentence originally awarded in said court at a time fixed in such order. This mode of suspending the execution of sentence after conviction on account of the insanity of the convict shall be exclusive and final, and shall not be reviewed or revised by or renewed before any other court or judge. No court or judge in this state shall have the power or right to suspend the execution of sentence of any other court of record on account of the insanity of the convict. This procedure shall not prevent the judge or court from impaneling a jury to try the question of insanity, or from examining such witnesses as he may deem proper for guidance.

§ 428. **Inquisition upon alleged insane prisoner; further proceedings.**—If any person in confinement, under indictment, or for want of bail for good behavior, or for keeping the peace,

or appearing as a witness, or in consequence of any summary conviction, or by an order of any justice, appears to be insane, the judge of any court of record of the county where he is confined must institute a careful investigation, call a respectable physician and other credible witnesses, and, if he deems it necessary, may call a jury, and for that purpose he is empowered to compel attendance of witnesses and jurors; and if it be satisfactorily proved that the person is insane, the judge may discharge him from imprisonment and order his safe custody and removal to the Alabama state hospitals, where he must remain until restored to his right mind; and then, if the judge shall have so directed, the superintendent must inform the judge and sheriff, whereupon the person must be remanded to prison, and criminal proceedings be resumed, or he be otherwise discharged.

§ 429. Court orders to hospital defendant acquitted an account of insanity.—When a person has escaped indictment, or been acquitted of a criminal charge on the ground of insanity, the court, being informed by the jury, or otherwise, of the fact, must carefully inquire and ascertain whether his insanity in any degree continues, and, if it does, shall order him in safe custody, and to be sent to the Alabama state hospitals.

§ 430. Powers of county courts and justices in misdemeanors.—Persons charged with misdemeanors, and acquitted on the ground of insanity, may be kept in custody and sent to the Alabama state hospitals in the same way as persons charged with crimes; and the county courts and justices of the peace shall have the same power in reference to persons charged before them with misdemeanors, as is bestowed upon the circuit courts in sections 428 and 429 of this title.

§ 431. Expenses to be paid by the state; when and how state reimbursed.—The cost of removing an insane prisoner

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to and from the Alabama state hospitals under any of the provisions of this chapter must be defrayed by the state as in the case of removal of prisoners from one county to another; and such cost, together with the expenses of such patient in the hospital, may be recovered by the state from such person, or his estate, or any relative who would have been bound to provide for and maintain him elsewhere.

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, one of the attorneys for the Petitioners and a member of the Bar of the Supreme Court of the United States, hereby certify that on this _____ day of _____, I did serve the requisite number of copies of the foregoing Petition for Certiorari on the Attorney for the Respondent by mailing said copies to him, postage prepaid, and addressed as follows:

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